Date: 20000607
Docket: CAC155817

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Innocente, 2000 NSCA 74)

Chipman, Freeman and Pugsley*, JJ.A.

BETWEEN:

DANIEL INNOCENTE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Warren K. Zimmer for the appellant Paula R. Taylor and Douglas L. Richard for the respondent
Appeal Heard:	January 28, 2000
Supplementary Submissions Received:	April 13, 2000 and April 27, 2000
Judgment Delivered:	June 7, 2000
THE COURT:	The appeal is allowed to the extent of quashing the conviction on the second count in the indictment. The appeal from the conviction on the first count is dismissed per reasons for judgment of Chipman, J.A.; Freeman, J.A. concurring. (*Pugsley, J.A. took no part in the judgment).

Chipman, J.A.:

[1] The appellant was convicted after a trial before Cacchione, J. and a jury, on two counts of conspiracy with Craig Henneberry and with others unknown to traffic in cannabis resin contrary to s. 4(1) of the **Narcotic Control Act** and s. 465.1(c) of the **Criminal Code**.

[2] The first count, as amended, related to the time period May 15, 1995, to July 30, 1995, the second to the time period June 1, 1995, to August 30, 1995.

[3] The appellant was found not guilty by the jury on two additional counts of unlawful possession of a restricted weapon and storing a firearm in a manner contrary to the regulations enacted under the **Criminal Code**.

[4] The conspiracy was alleged to involve the transportation from Montreal to Halifax of narcotics, and from Halifax to Montreal of money, concealed in a compartment located behind the rear seat of a Ford Thunderbird automobile with Quebec license plates. The Crown alleged that the appellant was the leader of the conspiracy and Craig Henneberry's role in it was driving the Thunderbird.

[5] Henneberry was the principal witness for the Crown. The Crown tendered additional evidence including search warrants, business records, wire tap evidence, and evidence concerning the location in Montreal and Halifax of the Thunderbird, and its

seizure on March 26, 1996. The Crown also adduced *viva voce* evidence from the registered owner of the Thunderbird, and other witnesses including a police officer who testified about the drug trade and the habits and behaviour of those engaged in it.

[6] On June 24, 1996, the Crown secured special search warrants and restraint orders from a justice of the Supreme Court attaching the appellant's residence at 47 Granite Cove Drive in Hubley, Halifax Regional Municipality, as well as chattels, including antiques, located in the residence. The chattels were seized by the RCMP on June 26, 1996, when the appellant was arrested.

[7] The appellant was arraigned on the charges of conspiracy at issue here on December 17, 1996.

[8] The appellant was represented by Warren Zimmer during a three-week preliminary inquiry on other charges held in September, 1997. On September 18, 1997, the appellant waived his preliminary inquiry on the present charges.

[9] On October 16, 1997, at a hearing in the Supreme Court at which the appellant was represented by Mr. Zimmer, three matters were set down:

(a) an indictment charging the appellant and three others with conspiracy, to traffic in cannabis resin. This indictment was eventually stayed by the Crown;

(b) an indictment charging the appellant and four others, including one Gilles Poirier, with conspiracy to traffic in cannabis resin and cocaine (No. 142212);

(c) the third matter, the present file, consisting of four separate indictments charging the appellant alone (No. 142210).

[10] The total trial time for the three cases was anticipated to be approximately ten weeks. The first trial (No. 142212) was scheduled to commence January 4, 1999, with the two remaining trials to proceed thereafter.

[11] In February, 1998, an application was made, by Mr. Zimmer, on behalf of the appellant, pursuant to s. 462.34 of the **Code**, for the return of the personal property seized by the RCMP on June 26, 1996. The appellant did not apply for a release of his residence. The application was dismissed by Davison, J. of the Supreme Court in a decision dated May 15, 1998.

[12] On November 27, 1998, an application (the **Rowbotham** application - see **R. v. Rowbotham** (1988), 63 C.R. (3d) 113 (Ont. C.A.)) was made by the appellant, self-represented, to Cacchione, J. for the appointment of legal counsel for the three matters, and in the alternative, for a stay of charges on the ground that the appellant could not receive fair trials without legal representation. The day before the commencement of the application, Crown counsel advised the court that the Crown had decided to release to the appellant some of the assets (primarily antique furniture) which had been under

seizure by the Crown. Crown counsel estimated the value of those assets at approximately $30,000. The appellant contended the release was effected too close to his prospective trial date of January 4, 1999, to enable him to sell the antiques and to retain counsel, if available, to be adequately prepared. The application was dismissed by Cacchione, J. I will refer to this later in greater detail.

[13] The trial of matter No. 142212 commenced before Cacchione, J. and a jury on January 4, 1999. The Crown proceeded against only the appellant and Poirier. Poirier was represented by counsel. The appellant was self-represented. On January 11, 1999, members of the jury panel not chosen were ordered to return for possible jury selection on Monday, March 22, 1999, in relation to the present case.

[14] The jury commenced deliberation on matter No. 142212 on March 10, 1999, but ended their deliberations on March 12, 1999, without being able to reach a verdict. Cacchione, J. declared a mistrial. Court was then adjourned to March 22.

[15] From March 19, up to and including April 6, requests were made to Cacchione, J. for further adjournments of the trial until the fall of 1999. All the requests were opposed by the Crown. Cacchione, J. granted an adjournment from March 22 to April 6, but on that morning, directed that the trial commence at 2:00 that afternoon. The trial commenced at that time and concluded on April 21st.

[16] Central to the Crown’s case was the testimony of Craig Henneberry. He was twenty-seven years of age at the time of trial. He acknowledged convictions for theft, possession of stolen property, driving offences, assaults, as well as fraud. His problems with the law commenced when he was about twenty years of age at which time he resorted to crime in order to acquire drugs for his personal use. He became addicted to drugs. His cocaine habit was costing him $1,000 a day "for quite a long time". He financed this by illegal activities which included dealing in drugs.

[17] Shortly after Henneberry was released from the Halifax Correctional Centre on April 13, 1995, he commenced working as a labourer for his uncles, Eric and Dino Henneberry, on residential construction sites. One of those projects involved the completion of the appellant's house at Granite Cove Drive. The appellant paid Henneberry in cash, “under the table”, on the basis of a rate of $8.00 an hour for his work.

[18] At one point Henneberry indicated to the appellant that he was available to do whatever the appellant wanted. He had an idea what the appellant was doing, but wasn't sure. One day the appellant said to Henneberry "Come on, we're going". They went to the airport and, taking pains not to be seen together, flew at the appellant's expense on the same plane to Montreal. Henneberry had not been in that city before. They went to an apartment numbered 301 on Clark Street just off Sherbrooke Street, where they met a man by the name of Francois Jarmain. Francois and the appellant had a discussion which Henneberry did not hear. He suspected what they were talking

about. Then they went to a restaurant and later to a lounge. Later that day the appellant and Henneberry returned to Halifax, taking care to avoid being seen together. Henneberry and the appellant never discussed the purpose of this trip.

[19] Shortly afterward, on returning from a weekend of camping at the Plantation Camp Ground in the Annapolis Valley, the appellant told Henneberry that he wanted him to participate in "the running of dope". Henneberry would get ten per cent of anything that he brought back from Montreal. Henneberry made the comment in his testimony that he knew they were not in Montreal to buy lumber.

[20] The appellant had a girlfriend in Montreal by the name of Helene Guitard. Ms. Guitard testified on behalf of the Crown that in 1995 he bought the Thunderbird for her. She signed the necessary papers to effect registration in her name. However, she never drove the car or had possession of it at any time. She was only in it as a passenger once for some five minutes. After the car was put in her name, the appellant distanced himself from her, and she realized that her relationship with him was over. She identified Henneberry in a photo lineup as a friend of the appellant whom she had met in Montreal on one occasion before June, 1995, when she went to work on a calèche. Sometime later the appellant contacted her, telling her that something had happened and he had to sell the Thunderbird.

[21] Henneberry testified that on his next trip to Montreal after visiting Francois, the appellant delivered the Thunderbird to him. He first saw the vehicle parked in front of

Francois Jarmain's apartment. He also saw it in the parking garage of the building where Francois was "loading" the vehicle. Henneberry said the appellant told him he paid $12,000 for the vehicle. He understood that it had been registered in the name of a female in Montreal. He had met her there on one of his trips. He did not know her name. He was instructed to drive the Thunderbird to the appellant's residence. The appellant drove the Thunderbird to a highway outside of Montreal. Francois Jarmain drove Henneberry to this location in his Nissan. The appellant returned with Francois and Henneberry proceeded to Halifax.

[22] On arrival at the appellant's residence, Henneberry was met by the appellant who told him to drive to the back of the house, and opened a compartment located behind the back seat. Henneberry saw sealed bags of hash stored in the area. He estimated that there were at least 150 bags but he wasn't sure. The appellant unloaded the cargo. Two individuals pulled into the driveway and took the cargo away. A short time later the appellant paid Henneberry approximately $5,000 for his services.

[23] Henneberry continued to operate the Thunderbird on the instructions of the appellant, making approximately a dozen return trips between Montreal and Halifax over the next six weeks. On each occasion, narcotics were secreted in the compartment and taken from Montreal to Halifax. On the return trip, substantial amounts of cash were transported to Francois Jarmain in Montreal. The money was brought by the two individuals who had unloaded the drugs from the car. Henneberry said "there were stacks of thousands". He did not know the precise amounts.

[24] Henneberry said that when the Thunderbird was in Halifax it was parked near, but not at, the residence of the appellant's sister where he was staying at the time.

[25] Henneberry testified that the operation ended in the summer of 1995, when the appellant accused him of converting to his own use part of the cash delivered to him for transport to Montreal. The appellant punched Henneberry in the head and kicked him. The evidence was that this happened on the appellant's father's birthday, which was established to be July 2.

[26] Henneberry said that he had been involved in the RCMP Witness Protection Program for approximately three years. He had been paid approximately $40,000 by the RCMP to cover his living expenses. Henneberry also received a cash award from the RCMP of about $20,000 for "my relocation purposes, sacrificing ... never coming back to Nova Scotia". At the time of trial, there was still another $10,000 to be paid to Henneberry by the RCMP "in relation to that".

[27] Evidence was adduced from additional Crown witnesses confirming material parts of the evidence of Henneberry:

(a) Henneberry's employment by the appellant at the appellant's residence, as well as location of the appellant's trailer at the Plantation Camp Ground in the Annapolis Valley;

(b) details respecting the Thunderbird, including its purchase by the appellant, its presence in Montreal and Halifax, the existence of the secret compartment, and the operation of the vehicle by Henneberry and others;

(c) wire taps of telephone communications of the appellant disclosing his attitude towards the Thunderbird and the termination of his relationship with Henneberry.

[28] Although the appellant did not testify, he called and examined five witnesses.

[29] It is not necessary at this point to review the evidence in any greater detail. In my view, the case for the Crown was overwhelming. It is not surprising that the jury recorded a guilty verdict on the two counts.

[30] The appellant was unrepresented when he filed his inmate appeal from conviction on April 22, 1999. He listed the following grounds of appeal:

1) I was forced to do the trial without counsel.
2) I feel that the jury erred in their decision.
3) The verdict is unreasonable.
4) The judge made a mistake when he refused to grant an adjournment and deprived me of my right to be represented by a lawyer when I had three lawyers that would take my case.
5) The judge failed to assist me in my defences.
6) The judge failed to order disclosure of information to allow proper cross-examination of Craig Henneberry.
7) The judge failed to order that I should be represented by counsel.
8) Any other grounds that are in the transcript.

[31] An application by the appellant to request leave to appeal from sentences of seven years on each count to run concurrently was subsequently abandoned.

[32] On July 23, 1999, Freeman, J.A., in Chambers granted, pursuant to s. 684 of the **Code**, the appellant's application to assign counsel to represent him on this appeal, to be paid by the Attorney General of Canada. This decision is reported at (2000), 178 NSR (2d) 295.

[33] Counsel for the appellant, Mr. Zimmer, in his factum filed on December 10, 1999, sought leave, which was granted, to add two grounds to the notice of appeal, alleging that the trial judge erred:

- ...in allowing the Crown to lead evidence from Craig Henneberry which was in violation of the rule against oath-helping;
- ...in failing to adequately or properly instruct the jury according to law.

[34] The submissions that the verdict was unreasonable and that the jury erred in its decision were dropped.

[35] The appeal was heard on January 28, 2000. On February 10, 2000, Mr. Zimmer requested leave to submit additional argument by way of a supplementary factum on the issue of the appropriateness of the trial judge leaving the two-count indictment to the jury when the Crown had clearly defined in evidence and in argument a single conspiracy. The request was granted.

[36] Supplementary factums were filed on behalf of the appellant on April 13, 2000 and on behalf of the Crown, on April 27, 2000. In these, as well as in the appellant's argument at the appeal, another issue arose - whether the trial judge erred in not

cautioning the jury respecting evidence of a "substance" found in the Thunderbird by police officers long after the time periods mentioned in the indictment had passed.

Issue I: Violation of the Rule Against Oath Helping

[37] The appellant submits that Crown counsel deliberately orchestrated her questions to Henneberry, and in her submission to the jury, to bolster Henneberry's credibility by stressing that he at personal risk to himself, had come out of hiding, and returned to Halifax to testify.

[38] In these circumstances, as the appellant was self-represented and was little match for experienced trial counsel, it is submitted there was a failure on the part of the trial judge to exclude this line of questioning or at the very least, to correct the imbalance by giving appropriate instruction to the jury that they could not use the suggestion that Mr. Henneberry was "in hiding", or that his life was in peril, to bolster his credibility.

[39] In particular, counsel for the appellant points to the opening question directed by Crown counsel to Henneberry ("I understand you are currently a member of the RCMP witness relocation program") saying that it does not form part of the "essential narrative in this case".

[40] It is submitted that in view of the opening question, it was not necessary to return to the issue of the location of Henneberry's residence at the close of the examination-in-chief some six hours later as illustrated by the following questions:

> Q. You've responded to my questions regarding expenses.
> A. Right.
> Q. Have you received any cash payments from the RCMP that aren't associated with expenses?
> A. They give you what they call an award or some type of - I believe it's called an award.
> Q. And what is it your understanding that that is about?
> A. That is for my relocation purposes and sacrificing never coming home, I guess.
> Q. And when you say "never coming home", what do you mean by that?
> A. Never coming back to Nova Scotia.
> Q. And how much have you been paid in relation to that?
> A. That would be the twenty, twenty grand.
> Q. All right. And is there any money outstanding to be paid to you in relation to that?
> A. Yes, there is.
> Q. And how much is that?
> A. Ten Thousand. (emphasis added)

[41] It is further submitted that Crown counsel took advantage of the appellant's inexperience on Henneberry's redirect, by posing questions which elicited responses already addressed in examination-in-chief. In particular, the following questions by Crown counsel are highlighted:

> Q. Mr. Henneberry, Danny Innocente has asked you - suggested to you and you have agreed, that you were paid $62,000 for your evidence and $10,000 outstanding for the rest of your evidence. What does that mean to you? What do you mean "for your evidence" or when you respond "yes" to that question?
> A. Would you repeat the question, on how you phrased that again?
> Q. When you respond "yes" to the question: You were paid $62,000 for your evidence and there's $10,000 left for the rest of your evidence, what do you mean by that?
> A. What do I mean?
> Q. What do you understand that to mean?
> A. Well the money that I had received was for my relocation purposes, sacrificing everything never to come back to Halifax. . . .(emphasis added)

[42] Counsel for the appellant refers us to the following comments by Crown counsel in her address to the jury:

> ... And if all you had before you was the evidence of Craig Henneberry, your job would be very easy. You would have to acquit, I would suggest. It would be impossible to be satisfied beyond a reasonable doubt on the evidence of this man about these things if that was all you had. . . . There are certain people that you simply don't trust at face value . . . The ordinary experience of your every day lives will lead you to be able to assess whether you can, with confidence, believe what the witness Craig Henneberry, had to say when he talks about this agreement . . .
>
> ... I told you right at the very beginning that all the other evidence you would hear besides Craig Henneberry would be for the purpose of giving you what's called corroborative evidence, or at least supportive evidence, evidence that would allow you to look at this witness and say, "He was telling the truth about that. I don't just have to believe him. I can look to other witnesses who don't have the baggage that he has in his lifestyle to decide whether or not I can believe him." ...

[43] And finally, the additional submissions:

> ... But he also . . . he acknowledged that when he entered the witness protection program that he received large sums of money from the RCMP in terms of his expenses, which was around forty-two thousand dollars ($42,000), in terms of a payment of twenty thousand dollars ($20,000) for relocation. And there's a further ten thousand dollars ($10,000) outstanding which he will be paid as a result of appearing for court. Now, what you have to remember is that this is a person who is now, in a sense, in hiding. (emphasis added)

[44] The appellant's counsel also complains of questions in redirect which revealed that the RCMP furnished a plane ticket to Henneberry, as well as $300 cash, for a statement that he gave in an unrelated murder investigation, prompting Henneberry's response:

> A. It was more or less, just, I gave the information and then my safety would be jeopardized, so they gave me the plane ticket and told me to get out of town because I probably wouldn't be too safe in Halifax.

[45] Counsel for the appellant submits the question was directed to contrast the payment made respecting co-operation in a murder investigation, with a much larger

payment made in a drug matter, to convey to the jury the seriousness of the drug investigation, and the resulting jeopardy to Henneberry.

[46] The Crown takes no issue with the general principle that until credibility is attacked, a witness is presumed to be credible and that evidence led solely to bolster credibility is not admissible. The Crown's position was that it was under a duty here to adduce evidence of Henneberry's criminal convictions, as well as evidence of the financial and security arrangements made with the RCMP to facilitate his co-operation.

[47] The Crown says that the evidence was led for the additional purpose of assisting the trial judge in assessing whether a special instruction was required to be given to the jury respecting the risk of adopting Henneberry's evidence. His testimony would obviously occupy "a central position in the purported demonstration of guilt and yet may be suspect", by reason that he was an accomplice as well as a person of disreputable character. See the comments of Dickson, J., later C.J.C., in **R. v. Vetrovec** (1982), 67 C.C.C.(2d) 1 (S.C.C.) at p. 17; **R. v. Bevan** (1993), 82 C.C.C. (3d) 310 (S.C.C.); **R. v. Brooks** (2000), 141 C.C.C. (3d) 321 (S.C.C.); and **Laughlin Ronald MacDonald v. The Queen** (2000), N.S.C.A., No. CAC 143210, (N.S.C.A.).

[48] Crown counsel points out that she first raised the issue of a **Vetrovec** caution with the trial judge before evidence was called. The correctness of this decision was later confirmed, she points out, as the judge gave a strong **Vetrovec** caution to the jury.

[49] Henneberry acknowledged during his examination-in-chief that he had a lengthy criminal record which included convictions for fraud, assault and theft, and that he had been a cocaine addict who lived "to get money to do drugs". When asked why he was interested in illegal activity he responded "that's just my lifestyle". In cross-examination he agreed that he was not only a thief, but also "a cheat and liar".

[50] Henneberry profited from his role as a witness for the Crown. He had been paid for his co-operation prior to giving his evidence, and was to be paid an additional $10,000 after he completed his testimony. The conditions, if any, surrounding the financial arrangements were not in evidence, but one might reasonably infer that final payment would be dependent upon his evidence remaining consistent with what he had indicated to the RCMP would be his testimony.

[51] The appellant takes no issue with the decision of the trial judge to give a **Vetrovec** warning, nor with the words in which that warning was expressed. In view of the authorities subsequent to **Vetrovec** to which I have referred, I believe that this was a case where such a warning was necessary.

[52] The rule against oath helping relied on by the appellant excludes evidence adduced "solely for the purpose of bolstering a witness's credibility". See **R. v. Beland and Phillips** (1987), 36 C.C.C. 481 (S.C.C.) per McIntyre, J. speaking for the majority at p. 486 to 489. However, such evidence, if relevant for another purpose, may be admitted. See **R. v. Sevillano** (1995), 104 C.C.C. (3rd) 189 (Ont. C.A.) at 192; **R. v.**

F.F.B., [1993] 1 S.C.R. 697 at 699. As Justice McLachlin (as she then was) put it in **R. v. Burns** (1994) 89 C.C.C. (3d) 193 (S.C.C.) on behalf of the court, at p. 202:

> The rule against oath helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible. . . The fact that evidence may be inadmissible for one purpose (i.e. showing the truthfulness of a witness) does not prevent it being received for another, legitimate purpose. . . (emphasis added)

[53] The appellant relies on the case of **R. v. Clarke** (1991), 63 C.C.C. (2d) 224, (Alta. C.A.). There, a jailhouse informant was called by the Crown to testify to an inculpatory statement made to him by the accused. Crown counsel conducted a lengthy examination of the jailhouse informant which focused on his current rehabilitation, his change in attitude towards society and the police, the fact that, at his own initiative, he was taking a course in Bible study, and had made voluntary restitution to the Unemployment Insurance Commission for funds he had fraudulently obtained, for which he had never been charged. Much of the evidence was elicited by leading questions, and in the opinion of the court constituted oath helping of the type found improper in such authorities as **R. v. Kylselka** (1962), 103 C.C.C. (Ont. C.A.) and **R. v. Burkhart** (1965), 3 C.C.C. (2d) 210 (Sask. C.A.) where evidence was led dealing with a witness's mental condition solely for the purpose of supporting her testimony.

[54] The Alberta Court of Appeal quashed the conviction and directed a new trial. McClung, J.A., on behalf of the court, said at p. 232:

> Obviously counsel must be permitted, in matters introductory, to present witnesses in the best allowable light. And, as here, adducing a witness's prior convictions need not await cross-examination ... But in my view, considering the origins of "John Doe", his evidence and the gravity of the issues, "John Doe's" examination in the excerpt quoted exceeded permitted limit. While Crown counsel's intention in leading evidence of "Doe's" reclamation might be offered as a simple introduction of him to the jury, it was subordinated to the

> overriding and dominant object of bolstering his character, and thereby his credibility - an issue new to the case. . . .
>
> And at p. 234:
>
> . . .Whatever the origin of the evidence, basic fairness in this case demanded that "John Doe" be presented in no inappropriate lustre. (emphasis added)

[55] Additional cause for concern arose out of remarks by Crown counsel respecting the credibility of the jailhouse informant and the accused. McClung, J.A. continued at p. 238:

> To be fair to counsel I quickly concede my advantage of reviewing the proceedings, including the closing submissions, with perfect hindsight unblurred by the intensity of the trial itself but I do not believe that this conviction can properly stand. When the pervading significance of “John Doe’s” veracity is considered - his evidence being described by Crown counsel as “the strongest piece of evidence we have”, and the manner in which “Doe’s” anonymity and the important issue of feigned black-out were left with the jury, I view this conviction as palpably unsafe.

[56] In approving the **Clarke** decision the Supreme Court of Canada in **Beland, supra**, at p. 487 characterized the impugned testimony as having the overriding and dominant objective of bolstering the witness’s character.

[57] The circumstances in the present case are quite different from those in **Clarke, supra**. While the Crown was careful to adduce evidence of Henneberry's lengthy criminal record, no attempt was made to suggest that there were any admirable characteristics which prompted his co-operation with the RCMP. The Crown conceded that, without more, it would not be possible to convict on Henneberry's testimony.

[58] The circumstances surrounding the ending of the conspiracy were relevant in order to establish a date for its termination, and also to evaluate Henneberry's motive

for co-operation with the RCMP. Prior to leading the evidence of Henneberry, the Crown had introduced intercepted wire tap communications from the appellant to a third party where the appellant was reported to have said:

> I haven't seen him since, ah, about a week . . .well, I put him through my wall down here at the house . . . he stole a bunch of money from me... three grand ... I put his head right through the wall.

[59] Counsel for the appellant has directed our attention to the comment made to the jury by Crown counsel:

> Now, what you have to remember is that this is a person who is now, in a sense, in hiding.

[60] It was submitted that it was improper for the Crown to suggest that Mr. Henneberry was in hiding when there was no evidence to substantiate such a suggestion. I would make two responses to this.

[61] First, the evidence-in-chief established that Mr. Henneberry was no longer living "in this area". It was appropriate for the Crown to adduce evidence that he had been paid money for relocation purposes and, in his words, "sacrificing never coming home, I guess". It would not be an unreasonable inference for the jury, on the evidence adduced, (i.e. the nature and size of the payment, the value of the alleged narcotics being transported, Henneberry's involvement in a witness relocation program) to conclude that Henneberry would be motivated to go "in hiding". The circumstances were not similar to those in **Clarke** where Crown counsel in summation said:

> ... what possible advantage could be there for him to lie? What possible benefit would he have in coming into this court and testifying unless he was telling you the truth? . . . How would he possibly benefit?

[62] Crown counsel in her summation in the present case made it very clear to the jury that if all they had before them was the evidence of Henneberry they could not convict.

[63] Clearly the Crown was not presenting Henneberry as an admirable witness in whose testimony the jury could have confidence in the absence of corroboration. No attempt was made to bolster his credibility by the evidence said to be oath helping. The Crown's position was that his story found support in the corroborative evidence of other witnesses.

[64] Second, while Henneberry may not have testified that he was "in hiding". He did testify on cross-examination that while in Alberta, as part of his relocation arrangements, he was using an assumed name. Even if counsel's use of the words "in hiding" may have been inappropriate, Cacchione, J. emphasized, in his charge to the jury, that they were the sole judges of the fact, that they should be guided by their own recollection of the evidence, and not that of Crown counsel or the appellant.

[65] While it might have been preferable if Crown counsel's overstatement had been specifically corrected by the trial judge in his charge to the jury, in my view there was no prejudicial error in the failure to do so.

[66] The evidence respecting Henneberry's co-operation with the RCMP in an unassociated murder investigation was an issue that was not raised in Henneberry's

examination-in-chief, but arose from questions directed to him in cross-examination by the appellant. This opened the door for the Crown to direct questions on that issue in re-examination.

[67] Crown counsel correctly raised with the court the issue of a **Vetrovec** caution to the jury. In these circumstances, it was incumbent upon the Crown to adduce evidence respecting all the arrangements made by the RCMP with Henneberry, including financial arrangements, as well as his status within the witness relocation program.

[68] I believe it was proper for the Crown in the circumstances of this case to introduce Henneberry's criminal record and the evidence respecting the financial arrangements between Henneberry and the RCMP. Those arrangements included all of the benefits he received, including participation in the Witness Program. All of this was relevant in order for the trial judge to assess the need for the **Vetrovec** warning and its content. It was also relevant in order to illustrate the nature of the conspiracy as viewed by one of the participants, a convicted felon with considerable experience in law breaking.

[69] The evidence of which the appellant complains was not introduced solely for the purpose of bolstering Henneberry's credibility. Its overriding and dominant objective was to fulfill the Crown’s duty of laying a proper foundation for the **Vetrovec** warning.

[70] I would reject this ground of appeal.

Issue 2: Disclosure

[71] On March 31, 1999, Mr. Pressé, having just been consulted by the appellant, wrote Cacchione, J. requesting an adjournment of the jury trial scheduled to commence on April 6, 1999. Mr. Pressé advised in his letter that he would not be available until after the end of May as a result of other trial commitments and "would still require time for preparation before I would be in a position to act for him".

[72] The request for an adjournment was also coupled with a request for additional information respecting the past criminal record of Henneberry. Mr. Pressé had reviewed a copy of Henneberry's criminal record as disclosed in a sheet prepared for the provincial Crown in Alberta and noted thirteen criminal convictions not previously disclosed. These had “just recently” come into the appellant’s possession. Additional information, Mr. Pressé suggested, revealed that further charges against Henneberry in Alberta were withdrawn by the Crown. The question he said, arose whether this was part of any agreement between Henneberry and the Crown with respect to either the matter before the court or some other matter in which Henneberry provided evidence for the Crown. There were some outstanding unexecuted warrants respecting three charges of theft. Mr. Pressé also sought where available, synopses respecting all convictions.

[73] Mr. Pressé's letter concluded:

> To summarize, My Lord, I have indicated I am willing to act for Mr. Innocente but would be unable to proceed on April 6, 1999. If an adjournment of the trial is granted, it would allow me to adequately prepare for the trial and also investigate these new matters that arise from the new information Mr. Innocente had just recently learned of.

[74] Mr. Pressé renewed the request for further disclosure when he appeared before Cacchione, J. on the morning of April 6.

[75] The Crown opposed the request for the adjournment. The Crown further submitted that it had given full disclosure of every aspect of the agreement between Henneberry and the Federal Crown. Provincial records with respect to other arrangements were not available to the Federal Crown. The Federal Crown could not have had anything to do with the withdrawal of charges laid by a Provincial Crown. The Crown maintained that in any event dealings with respect to such matters would be protected as a matter of informant privilege.

[76] At the conclusion of Mr. Pressé's motion, Cacchione, J. ruled on the request for an adjournment but did not expressly rule on the request for additional disclosure. Both the Crown, and Mr. Zimmer, in their facta filed on this appeal, assumed that there had been an implicit rejection of the request.

[77] Later on April 6, the appellant, then self-represented, raised with Cacchione, J. the disclosure issue initiated by Mr. Pressé.

[78] After receiving further submissions, Cacchione, J. further determined (correctly in my view) that he would not permit evidence relative to information which Henneberry had provided to the police on unrelated matters.

[79] Cacchione, J. directed the Crown to conduct another CPIC check, updated as of April 6, and provide the information to the appellant "before tomorrow morning". This would cover all criminal records in Canada supported by fingerprints. We are advised by Crown counsel at the hearing of this appeal that the Crown complied with that instruction.

[80] At the commencement of the proceedings on April 7, there was further discussion on the issue and Cacchione, J. ruled as follows:

> ... Now, you have, Mr. Innocente, the fact that Mr. Henneberry has or did become an informant with respect to this case. Whether or not he's an informant or has been or was an informant on other cases is really not relevant to these proceedings...whether he testified in another case or gave information in another case and what he got in return for that I don't see as being relevant. What's relevant is what he got or was promised or offered with respect to this case.

[81] Crown counsel represented to the court that she had disclosed Henneberry's complete contact with the RCMP in his capacity as a protected witness.

[82] The matter was adjourned to the morning of April 8. After receiving further representations on behalf of the appellant and the Crown, Cacchione, J. concluded:

> You have an officer of the court who is under an obligation to perform her duties in accordance with the law and I have nothing before me that would indicate that that hasn't been done . . . It seems to me that you have been given the materials that you are entitled to.

[83] It is important to appreciate that the appellant had previously received from the Crown the criminal record of Henneberry as contained in the CPIC fingerprint record.

[84] The appellant was represented by experienced counsel on a number of occasions since he was first charged on June 28,1996. No request for disclosure of the underlying circumstances of the offences noted on Henneberry's criminal record was made until Mr. Pressé wrote the court on March 31, 1999 and followed up with his submissions on April 6. Nor was any request previously made for disclosure respecting any convictions noted on provincial criminal records in any other province. It is to be noted that the request for disclosure, first instituted through Mr. Pressé and pressed by the appellant on April 6, was only made after the trial judge had decided on March 22 that the trial would not be adjourned an additional eight months to accommodate Mr. Zimmer's schedule, but would proceed on April 6.

[85] Disclosure is a two-way street. The process is one:

> ...which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. (**R. v. Bramwell** (1996), 106 C.C.C. (3d) 365, at 374 (BCCA).

[86] The appellant's position is, in effect, that the trial judge's failure to order disclosure was an error in law within s. 686(1)(a)(ii) of the **Code**, and that the non-disclosure occasioned a miscarriage of justice within s. 686(1)(a)(iii) because of the impairment of the appellant's ability to make full answer and defence.

[87] It has not been shown that the Crown did not produce all the material in its possession respecting Henneberry's criminal record.

[88] Should the Crown have gone further and requested additional information from the Alberta provincial Crown? No further attempt seems to have been made to obtain this information before the trial was concluded on Monday, April 19th. Mr. Zimmer had contacted the Alberta authorities before Mr. Pressé wrote the court on March 31, 1999, but how long previously is not known.

[89] There is no question that on the record the appellant had access to legal counsel. He was accessing and receiving advice from Mr. Zimmer, apparently, on a continuous basis. For example, in the course of the **Rowbotham** hearing, while self-represented, he referred to ongoing advice received from Mr. Zimmer. Mr. Pressé was acting for him during this period. It was prior to March 31 that the information respecting the provincial offences in Alberta came into the hands of the appellant's legal advisors, but just when is known only to them.

[90] No satisfactory explanation was made on the appellant’s behalf why these matters were not followed up by the defence, as it appears they could have been, much earlier. The charges herein were laid on June 28, 1996 and the appellant, through Mr. Zimmer, waived a preliminary inquiry on September 23, 1997. At that time trial was set for January 1999 to accommodate Mr. Zimmer’s schedule. These latest requests were first made to the Crown by Mr. Pressé's letter faxed at 4:04 p.m. on March 31, 1999, the

last day before the Easter weekend intervened. Trial was scheduled to start on April 6th, the day after Easter Monday.

[91] Any order for disclosure beyond that which Cacchione, J. made on April 6th respecting completed CPIC records would, of necessity, have required an adjournment of the trial, a subject that I will address later.

[92] In **R. v. Dixon**, [1998] 1 S.C.R. 244, Cory, J., for the court said at p. 263:

> . . . Where non-disclosure is raised on an appeal from a conviction, an accused must, as a threshold matter, establish a violation of the right to disclosure. Further, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose.
>
> This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the over all fairness of the trial process . . .

[93] An examination of the record does not disclose that the appellant was hampered in his cross-examination of Henneberry for want of information about his criminal past. The appellant exercised the opportunity to extensively question Henneberry respecting his previous record, as well respecting offences for which he had never been charged. The defence was in possession of information disclosing a lengthy criminal record. The appellant in his cross-examination of Henneberry got him to concede that his criminal record was so long that he could not remember the entirety of it.

[94] During the course of that cross-examination, Henneberry was asked by the

appellant:

> Q. You had a lot of crimes?
> A. Yeah, I have. It's not short, by any means.
> Q. Okay, how many crimes have you committed that you haven't been caught for that you can . . .
> A. How many crimes have I ...
> Q. That might come to your recollection?
> A. I wouldn't - I couldn't imagine to think about how many.
>
> . . .
>
> Q. You have been paid Sixty-two Thousand Dollars ($62,000) for your evidence. Correct?
> A. Correct.
>
> . . .
>
> Q. And you have Ten Thousand Dollars ($10,000) more coming for the rest of your evidence. Correct?
> A. Correct.
> Q. Have you ever had any other scam that made you Sixty-two Thousand Dollars ($62,000)?
> A. Well, I had - I've never had a scam yet that's made me Sixty-two Thousand Dollars ($62,000).
> Q. Okay. So, if this is not a scam, then why do you have so much trouble telling the truth on the two statements under oath?
> A. Again, it's just my memory from back at that point in time was not too fresh.

[95] The appellant then asked a number of questions respecting crimes for which Henneberry had not been charged - apparently known to the appellant - and which Henneberry acknowledged.

[96] I have taken into account that in exercising his discretion not to order further disclosure at such a late hour Cacchione, J. was made aware that the Crown had disclosed what was in its possession and had responded to all requests for disclosure. The appellant had been armed with considerable information regarding Mr. Henneberry as is apparent from his effective cross-examination of him.

[97] Any additional details that might have been unearthed as a result of a timely defence request for further particulars of Henneberry's record could probably not have painted Henneberry in a worse light than was already revealed in both direct and cross-examination.

[98] In **R. v. Dixon**, **supra** Cory, J. said for the court at p. 265:

> In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe, supra,* at p. 341, defence counsel's duty to be duly diligent was described in this way:
>
> > Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.
>
> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:
>
> > ...the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused in not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

[99] The role to be played by defence counsel is a role to be exercised in a timely manner.

[100] Thus, even assuming that there was non-disclosure by the Crown here, and even assuming that there was a reasonable possibility that such non-disclosure affected the outcome of the trial or the overall fairness of the trial process, the late request made here bespeaks a lack of due diligence on the part of the appellant or his advisors in pursuing this information. In this regard I consider the trial judge's finding that the appellant had done whatever he could to ensure that the trial did not proceed is strongly supportive of the conclusion that there was a lack of due diligence, deliberate or otherwise.

[101] The appellant was given a wide latitude in his cross-examination of Henneberry. He secured the latter's admission that he was a cheat, liar and thief. A very strong **Vetrovec** caution was given by the trial judge. In view of all this I am satisfied that the appellant's ability to advance a full answer and defence was not compromised as a result of any failure to disclose further particulars of provincial convictions and underlying data relating to the convictions. The appellant has simply not discharged the burden imposed on him in his quest for further information.

Issue 3: Refusal to Grant an Adjournment

[102] On October 16, 1997, the court scheduled the trial of the three indictments involving the appellant to proceed *seriatim*, the first trial to commence on January 4, 1999.

[103] The first trial concluded on March 12, 1999, when a mistrial was declared after the jury could not reach a verdict.

[104] The appellant was directed to appear on March 19, 1999 (adjourned on that date to March 22) for the commencement of the second trial.

[105] On March 19, Mr. Zimmer wrote Cacchione, J. advising:

> I have been asked to represent Mr. Innocente by his mother, Gwen, and I would be prepared to take such instructions.
>
> . . .
>
> I have been asked to request that the aforementioned trial be adjourned until the next convenient date to allow for counsel to appear with Mr. Innocente. I presently have trials scheduled for March 22nd and will be travelling to Toronto later next week to deal with family estate matters. I will be out of the Province until April 4th, or 5th, 1999. ...
>
> . . .
>
> I understand that November 1, 1999, is presently available in the Supreme Court for a new trial date.

[106] On March 22, the day selected for the commencement of the second trial, the appellant, without counsel, cited Mr. Zimmer's commitments, and requested an adjournment to November, stating:

> If there is anything sooner, then, you know, I don't think there'd be any problem.

[107] The Crown opposed the request for the adjournment.

[108] The appellant then advised the court that he had consulted a second lawyer, Joshua Arnold, and received a letter from him stating:

> 1) On Thursday, March 18, 1999, at approximately 4:30 p.m., you contacted my office by telephone to enquire as to my availability to represent you at a two week Supreme Court Judge and Jury trial scheduled to commence Monday March 22, 1999;
>
> 2) I advised you that due to prior court commitments, combined with the fact that I could never be prepared for your trial on such short notice, there was no way I could agree to represent you in this matter;
>
> 3) You then inquired as to my first available dates for a two week Supreme Court Judge and Jury trial and requested that I put this in writing;
>
> 4) I can advise you that I would not be available to undertake this type of commitment until the Fall of 1999.
>
> 5) Of course before I agree to represent you on any matter, including this one, appropriate arrangements would have to be made regarding a retainer and my fees. (emphasis added)

[109] During the course of submission to Cacchione, J. the appellant advised:

> When I spoke to Mr. Zimmer, he said he'd be back in the middle of April.
>
> The Court:
> His letter says 4th, 5th, or 6th. Something like that.
>
> Mr. Innocente:
> So he's willing to come on at that point if you can adjourn it to that.
> (emphasis added)

[110] Crown counsel advised that out of town witnesses were present, or en route, at "tremendous expense", one of them involving "the witness protection program and all that entails".

[111] Cacchione, J. determined that the matter would be put over until Tuesday, the 6th of April at 9:30 for commencement. He continued:

> Mr. Innocente is to advise Mr. Zimmer immediately that that is the trial date and to advise him of the court's concerns about a conflict. And if that poses a problem for Mr. Zimmer, that'll be on your shoulders, Mr. Innocente, to obtain counsel who is prepared and ready

> to go on April 6th. And if counsel appears and says "I need time" that time will not be given. I'm not tying up a jury for any longer than that.

[112] Mr. Zimmer did not appear on April 6. He was apparently in court in Truro. Rather, Mr. Pressé, on behalf of the appellant, appeared requesting an adjournment until the fall.

[113] Mr. Pressé requested an adjournment because of his own personal commitments. He said in part:

> We'd likely be looking for a date in the fall for an adjournment if I was to act for Mr. Innocente. . . . Mr. Innocente has indicated that Mr. Zimmer has returned from Toronto and is in court in Truro today, but advised that he would be <u>available for some dates in May, on May 3rd through the 25th.</u> (emphasis added)

[114] The advice respecting Mr. Zimmer's unavailability until May was not consistent with the advice expressed by the appellant on March 22 that Mr. Zimmer was "willing to come" on April 6. I would conclude, however, that on reading Mr. Zimmer's letter of March 19, 1999, that not only did he not represent that he would be available on April 6th, but he impliedly indicated no willingness to look at the matter before the fall of 1999.

[115] The Crown opposed Mr. Pressé's request for an adjournment.

[116] Cacchione, J. reviewed the events that had occurred since October of 1997, and refused the request for an adjournment, stating in part:

> . . . quite frankly it appears to me that Mr. Innocente does not want this trial to proceed and <u>has done whatever he can to achieve that end</u>. (emphasis added)

[117] In order to consider this ground of appeal, it is useful to set out Cacchione, J.'s complete reasons:

> This is not Mr. Innocente's first request for an adjournment. A chronology of the events on this file is required in order to properly address this latest request for an adjournment. As I've stated, the trial was initially set down in October, 1997, scheduled to begin January 4th, 1999. Between October, 1997 and February, 1998 nothing was done. It was only in February of 1998 when Mr. Innocente, through his then counsel, Mr. Zimmer, brought an application for an Order pursuant to Section 462.34 of the *Criminal Code* for the return of certain property seized from him. The request was that the property be returned so that he could dispose of it in order to meet living expenses and reasonable legal expenses. . . . The application was . . heard, I believe it was April 30, 1998 by Justice Davison, who rendered a decision on May 15th dismissing the application. Preliminary meetings with counsel and with all of the accused who were indicted on various indictments contained in this and other files began in late September, 1998 and continued throughout October, November and December of 1998. These preliminary meetings were an attempt to weed out some of the more contentious issues that might arise. They were intended to deal with any applications that might be brought before the trial and throughout all of these preliminary meetings, Mr. Innocente appeared alone. He was kept advised of the developments and, in particular, he was advised on more than one occasion that the trials set for January 4th, 1999, were, in fact, going to begin on January 4th, 1999. As early as October 16th, 1998 Mr. Innocente advised this Court that Nova Scotia Legal Aid was reviewing his application for Legal Aid representation. He indicated that if Legal Aid were denied to him, he would apply to the Court for the appointment of counsel. In fact, on November 20, 1998 Mr. Innocente made an oral application for the appointment of counsel and this matter was scheduled and heard on November 27th, 1998.
>
> On that day, the Crown agreed to the release of certain items that it had seized from Mr. Innocente with an alleged value of thirty thousand dollars ($30,000). It would be useless to comment on the tardiness of the release of those exhibits; however, those were released to him in November - on November 27, 1998. The application proceeded and it was noted that in September of 1998 Mr. Innocente had received a settlement of sixteen thousand dollars ($16,000) for a civil action. This money was, according to his testimony, used by him to pay off certain debts and to meet living expenses and not to engage counsel to represent him during these trials. Mr. Innocente applied for Legal Aid for the first time in May of 1998. He was denied. He appealed that denial and the appeal was dismissed. He then reapplied in September or October of 1998 and was denied again. He did not appeal that decision, nor did he seek to enter into any agreement pursuant to the Legal Aid Act, and I believe it's sections 21 and 22 of that Act, which would allow for a contract to be entered between the Applicant, in this case Mr. Innocente, and Legal Aid, whereby legal representation would be provided in return for an agreement to pay a portion or all of the fees at some later date. At the conclusion of the hearing on November 27, 1998, Mr. Innocente's application for the appointment of counsel was dismissed on the basis that he had not made reasonable efforts to obtain representation. The trial did begin on January 4th or shortly thereafter and continued until March 12, 1999. He was unrepresented during that trial but it was obvious that he relied heavily on the representations made by Mr. Burke, who was acting for another accused. It was made clear several times during the course of that first trial that Mr. Innocente was, in fact, negotiating with Mr. Zimmer for representation for all or part of that trial. It was also made clear during those proceedings that Mr. Innocente was in regular contact with Mr. Zimmer and obtaining advice from him. Mr. Innocente knew as of January 11, 1999, that this trial, the one we are scheduled to begin today, was set for and would begin on March 22, 1999.

> He was present when the jury panel was told to return on March 22 for selection for service on this trial. On March 19, 1999, Mr. Zimmer directed a letter to the Court indicating that he was prepared to represent Mr. Innocente but would require an adjournment, preferably to a November, 1999 date. His letter, as I recall, states, and I quote:
>
> > "I have been asked to represent Mr. Innocente by his mother, Gwen, and I'll be prepared to take such instructions."
>
> And then he goes on to relate how he would require time to prepare. Mr. Zimmer did not attend Court on March 22. Rather, Mr. Innocente appeared alone and presented the Court with the letter to which I've just referred. Also, one from Mr. Josh Arnold, who also stated that he could represent Mr. Innocente if the case were adjourned. On March 22, 1999, I adjourned this matter to April 6, a period of approximately two weeks or more - 15 days actually. And I instructed Mr. Innocente that the trial would proceed on April 6 with or without counsel. I thought I made myself very clear at that time. The adjournment which I granted, this two week adjournment from the 22nd of March to April 6th, was granted at great inconvenience and expense to the Crown who, as I understand it, had witnesses already in the Court building ready to testify. It was also granted so that Mr. Zimmer could make arrangements to be present to proceed with the trial. .. . . Mr. Zimmer is not present and he has not communicated directly with the court since his letter of March 19, 1999. Mr. Pressé is now here seeking an adjournment, saying he requires the time not only to adequately prepare for the trial, but also because he is committed to a six week trial scheduled to begin within two weeks. Mr. Innocente has known as far back as May of 1998 that Mr. Zimmer might not be his lawyer. He has done little until the very last minute to retain other counsel. He now seeks an adjournment because he has no counsel. Quite frankly, it appears to me that Mr. Innocente does not want this trial to proceed and has done whatever he can to achieve that end. He has refused to consider any arrangement with Nova Scotia Legal Aid and has insisted that Mr. Zimmer be his counsel. He has reached a retainer agreement with Mr. Zimmer at the very last possible moment and at a time when it would be difficult for any counsel to clear his or her docket in order to attend. He has sought out other counsel who would only be prepared to act if the trial were again adjourned. Mr. Innocente, in my opinion, has had sufficient time to retain and instruct counsel. He has not done so, knowing that he was advised by this Court that the trial would proceed on April 6, with or without counsel. I've heard nothing today that would cause me to change my mind. . . . I cannot keep adjourning this thing month after month, year after year with these last minute potential agreements being reached with counsel. We're going to start at 2:00 o'clock this afternoon. (emphasis added)

[118] This decision makes it abundantly clear that Cacchione, J. did not believe that the application was made in good faith. His finding that the appellant had done whatever he could to avoid going to trial is a strong one, and not been shown to be wrong. As I have already pointed out on October 16, 1997 the trial date was fixed as January 4th, 1999 to accommodate Mr. Zimmer's schedule. By the time that trial date arrived Mr. Zimmer was no longer acting for the appellant.

[119] The thrust of the appellant's submissions on this ground of appeal is primarily directed to "errors in law" committed by Cacchione, J. in his decision of November 27, 1998, rejecting the appellant's **Rowbotham** application. His November 27 decision, as well as Davison, J.'s decision of May 15, 1998, (dismissing the appellant's application to order the Crown to release the appellant's chattels from Crown seizure) were a part of the chronology of events considered by Cacchione, J. in his rejection on April 6 of the appellant's application to adjourn the trial date. The appellant submits that as the **Rowbotham** decision was based on errors of law, those errors "tainted" the decision of April 6, 1999.

[120] The errors of law alleged on the part of Cacchione, J. in the **Rowbotham** decision are:

(a) He failed to inquire into the Crown's reason for the delay in returning part of the appellant's antique furniture. Further, the court "did not advise the appellant that he had a right to make a full inquiry of the Crown and the police as part of his application". (Citing **R. v. Taylor** (1995), N.S.J. No. 290, para. 23, **Barrette v. R.** (1976) 29 C.C.C. (2d) 189 (S.C.C.)). The day before the **Rowbotham** application was heard, the Crown had advised it would release antiques (valued at $30,000 by the Crown) seized from the appellant in June of 1996, to enable the appellant to retain counsel. The appellant submits the antiques had a value of less than $20,000, and in any event, the partial release was too close to the January 4, 1999,

commencement date of the first of the three trials involving the appellant, to have any meaningful effect;

(b) Cacchione, J. in the course of the **Rowbotham** judgment, referred to an affidavit deposed by the appellant, and tendered by him, in support of his application before Davison, J. That affidavit was not tendered on the **Rowbotham** application and was not, in the appellant's submission, "admissible by virtue of s. 13 of the **Canadian Charter of Rights and Freedoms**".

(c) During the course of the cross-examination of the appellant on the **Rowbotham** application, Crown counsel directed questions to the appellant, respecting the earlier findings made by Davison, J., in particular:

> Q. And you can recall that Justice Davison of this court heard that application?
> A. And basically called me a liar?
> Q. Do you recall . . . oh I'll get to that. That's coming.
> . . .
> Q. This application made back in May, this morning you stated in your testimony that the judge called you a liar.
> A. Yeah, he said . . .
> Q. Have you ever had the opportunity to read the judgment of Justice Davison?
> A. Yeah. I read it last night.

[121] In addition, the appellant refers to Crown's summation in these words:

> Justice Davison made some pretty critical findings on credibility here. Now Mr. Innocente is before the court again on this application.

[122] The appellant's submission, on this latter issue, is summarized:

> The use of the evidence and the findings of Justice Davison . . . was not permitted by law and effectively tainted those proceedings in front of Justice Cacchione. This taint continued to follow the appellant throughout . . . to the extent that Justice Cacchione relied on what had occurred before him on November 27, 1998, as it related to the proceeding before Justice Davison under 462.34 (of the **Code**), it is respectfully submitted that the

> trial judge erred in that that information was not admissible as being contrary to s. 13 of the **Charter**.

[123] Under s. 13 of the **Charter**:

> 13. A witness who testifies in any proceeding has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[124] I am of the view that there is no merit in the submissions that Cacchione, J. committed errors of law in the course of the **Rowbotham** application. Whatever the merits, if any, of the submissions concerning Cacchione, J.'s failure to enquire into the reasons for the Crown's delay in returning part of the appellant's antique furniture, I conclude that the appellant's failure to include a request for the release of his residence from Crown seizure at any time prior to the commencement of his trial on April 6, 1999, demonstrates that the appellant valued his retention of his residence as a higher priority than retaining counsel.

[125] During the course of the **Rowbotham** application, the appellant was questioned respecting his use of money he had received in September, 1998, in settlement of a claim for personal injuries arising out a motor vehicle accident. He testified that he had used the settlement monies to pay back obligations for materials supplied to the house, as well as to repay advances made by friends to meet living expenses.

[126] The appellant was asked:

> Q. Did you ever think about spending that $16,000 on legal fees?
> A. Not at all.

> Q. Why not?
> A. Well, if I lose the house, there's no point fighting anything, is there?

[127] Further, it is clear from the reasons given by Cacchione, J. that the decision denying the **Rowbotham** application was based primarily, not on the material contained in the appellant's affidavit tendered in April, 1988 before Davison, J. nor on the adverse credibility findings of Davison, J., but on the evidence given *viva voce* by the appellant on the **Rowbotham** application.

[128] In considering the two-part test which the appellant was required to meet in the **Rowbotham** application, Cacchione, J. concluded that the case was of "such a complex nature that it would be difficult for the appellant, acting on his own, to adequately represent himself", but continued:

> However, it would appear from your testimony elicited in cross-examination that there have been, and there are, avenues of credit available to you to enable you to retain counsel. Now, it may not be counsel of your choice, it may not be somebody who charges however many hundreds of dollars per hour, despite that, I think that you can, and would be able to, retain counsel, even for the limited purposes of challenging the admissibility of the wire tap evidence and the admissibility of whatever may have been seized during the seizure, search and seizure. It seems to me that the various amounts that you set out in your affidavit, in your first affidavit, on the applications for the release of certain monies, there are people, obviously there are companies, who have loaned you, or sold you, goods and have not been paid, according to that affidavit. But it would also appear that there's major contradictions between monies owed to persons who assisted you in building your house and your evidence today that the house was, in fact, largely built with the assistance of friends, and that many of the carpenters didn't require receipts. They wanted to be paid, as they say, "under the table". Yet the receipts show up in your affidavit, or at least the invoices, or your claim to an invoice shows up. I am not satisfied on the balance of probabilities, Mr. Innocente, despite the fact that your assets have been seized and returned by the Crown, that you do not have the ability to retain counsel.

[129] With respect to the chattels released by the Crown, Cacchione, J. said in part:

> There is something there with which you can obtain credit. It may be that you're not going to get $30,000 for that property, but despite the fact that it's late fall, there are still

> wholesalers or jobbers available who will, no doubt, purchase these items, perhaps not at $30,000, but I think there is some avenue there for income to retain counsel.

[130] It is clear from reading his reasons that Cacchione, J. dismissed the **Rowbotham** application because he did not believe the appellant's assertion that he could not fund his own defence - that he did not do what he could have done over the period from October 16, 1997 to November 27, 1998 to secure counsel. There is ample evidence in the record of the **Rowbotham** application to support that conclusion, in particular the evidence of the appellant's lifestyle and spending habits in the face of his claim to be without means.

[131] Cacchione, J. did not rely upon the adverse findings made by Davison, J. respecting the appellant's credibility. He referred to the affidavit filed before Davison, J. which had not been refiled on the **Rowbotham** application, but it was used only to contrast the statements made in the affidavit respecting monies owed to persons who assisted in building his house, and his *viva voce* evidence that the house was largely built with the assistance of friends, many of whom didn't require receipts.

[132] The affidavit used in the proceeding before Davison, J. was sworn before counsel representing the appellant at the time. It was not used before Cacchione, J. on the **Rowbotham** application for the purpose of incriminating the appellant, but rather to impeach his credibility. This was an appropriate use, and does not offend the appellant's **Charter** rights under s. 13. See **R. v. Kuldip**, [1990] 3 S.C.R. 618 per Lamer, C.J.C. for the majority at 639, 61 C.C.C. (3d) at p. 397.

[133] The power to grant, or refuse, an adjournment is in the discretion of the trial judge.

[134] In **R. v. McCallen** (1999), 131 C.C.C. (3d) 518, speaking for the Ontario Court of Appeal, O'Connor, J.A. said at p. 533:

> The law is clear that the decision to fix a date for trial is discretionary and that in choosing a date the court must act judicially and balance a number of factors including the availability of an accused's counsel of choice within a reasonable period of time. Many of the same factors come into play in decisions whether to adjourn a trial date in order to permit an accused's counsel of choice to be available. The emphasis is on the reasonableness of the delay involved in accommodating the accused's choice; if the counsel of choice is not available within a reasonable time, then the rights of the accused must give way to other considerations and the accused will be required, if he or she chooses to be represented, to retain another counsel who is available within a reasonable period of time: ...

[135] The principles governing the discretionary power of a trial judge to grant or refuse an adjournment and the scope of appellate review of the exercise of such a discretion are set out by Hallett, J.A. of this court in **R. v. Beals** (1993), 126 N.S.R. (2d) 130 at para. 29.

[136] The onus is on the appellant to establish that in the exercise of his discretion, Cacchione, J. failed to act in accordance with proper legal principles (see **Manhas v. R.**, [1980] 1 S.C.R. 591).

[137] Mr. Zimmer had been aware since October 16, 1997, that this matter was one of three matters involving the appellant that would be tried *seriatim* commencing January 4, 1999. It was apparent to the court that from the commencement of the first trial on

January 4, 1999, that Mr. Innocente was in regular contact with Mr. Zimmer and obtaining advice from him.

[138] I have examined the record relating to the application for the adjournment as well as the correspondence from Messrs. Zimmer, Joshua Arnold and Pressé.

[139] Mr. Zimmer had previously acted for the appellant, and although it appears that he and the appellant were in communication from time to time, he was no longer acting for him. The only communication from him was his letter of March 19, 1999 in which he made no representation that he was actually retained by the appellant. In effect he suggested that the matter be adjourned to November 1, 1999. The closest he came to a commitment was in these words “I have been asked to represent Mr. Innocente by his mother, Gwen, and I would be prepared to take such instructions”.

[140] Mr. Arnold did not appear in court on the appellant’s behalf. His letter to the appellant dated March 22, 1999 stated that he would not be available to undertake this type of an assignment until the fall of 1999. He emphasized that appropriate arrangements would have to be made regarding a retainer and fees.

[141] Mr. Pressé wrote on March 31, 1999 that he would not be able to act for the appellant if the trial commenced on April 6th. He took the same position when he appeared before Cacchione, J. on that date. He would not be available until after the end of May 1999. He suggested a date in the fall. He said that he understood that the

appellant had spoken to a number of other lawyers. He continued “We’d likely be looking at a date in the fall for an adjournment if I were to act for Mr. Innocente”.

[142] I am satisfied that Cacchione, J. took great care to set out in his decision the history of the proceedings and his finding that the appellant was deliberately attempting to prevent the trial from moving ahead. He obviously had in mind the factors set out in the passage quoted from **McCallen, supra,** as relevant considerations on a request for an adjournment. He was, in my opinion, not faced with conditions that compelled an adjournment. The language used by the Ontario Court of Appeal in **R. v. Smith** (1989), 52 C.C.C. (3d) 90 at p. 92 is on point:

> Where the accused desires to be represented by counsel, then unless the accused has deliberately failed to retain counsel or has discharged counsel with the intent of delaying the process of the court, the court should afford the accused a reasonable opportunity to retain counsel. (emphasis added)

[143] In **R. v. Howell** (1996), 103 C.C.C. (3d) 302 (N.S.C.A.) this court said at p.324:

> ...the many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial. . .

[144] The Crown had witnesses who had come from Quebec, Ontario, Prince Edward Island, Newfoundland and locally. As well Henneberry, being in the Witness Protection Program, required appropriate security arrangements.

[145] It is apparent to me that the disclosure request was one device being employed to attempt to trigger an adjournment and thereby disrupt the orderly process of the trial.

[146] I am satisfied that Cacchione, J. did not err in granting an adjournment for a short period only. He concluded that the appellant did not satisfy the burden that he did not have the ability to retain counsel. That conclusion was based chiefly on his failure to utilize avenues of credit such as his residence and the chattels released to him and that he preferred to use the monies received from the automobile settlement to pay back suppliers or friends who had made advances rather than use that amount to obtain counsel. The appearance and disappearance of counsel for the appellant over the many months that intervened from the laying of charges to the request for disclosure and an adjournment and the finding of the appellant's overriding motive in attempting to avoid trial, support the conclusion that the decision to refuse an adjournment was properly exercised.

[147] I would dismiss this ground of appeal.

Issue 4: Trial Without Counsel

[148] I have already reviewed Cacchione, J.'s decision in the **Rowbotham** application at length. That application was denied because the appellant did not satisfy the burden resting on him that he did not have the ability to retain counsel. The evidence adduced before Cacchione, J. fully supported that conclusion.

[149] In **Rowbotham**, **supra** the following statement was made by the court at p. 171:

> As a matter of common sense, an accused who is able to pay the costs of his or her defence is not entitled to take the position that he or she will not use personal funds but still to require legal aid to bear the cost of his or her defence. A person who has the means to pay the costs of his or her defence but refuses to retain counsel may properly be considered to have chosen to defend himself or herself.

[150] I would reject this ground of appeal.

Issue 5: Failure of the Trial Judge to Assist in the Defence - Failure to Adequately or Properly Instruct the Jury

[151] A trial judge is under a duty to provide reasonable assistance to an unrepresented accused to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. See **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334, (Ont. C.A.) per Griffiths, J.A., on behalf of the court, at 347.

[152] The key is whether the defence has been given every opportunity to make full answer and defence. See **R. v. Campbell** (1981), 49 N.S.R. (2d) 307, (N.S.C.A.) per Jones, J.A., at 59.

[153] Limits to the scope of assistance to be afforded by the trial judge were described by Thorson, J.A. in **R. v. Taubler** (1987), 20 O.A.C. 64, at 71:

> While it is undoubtedly true that a trial judge has a duty to see that an unrepresented accused person is not denied a fair trial because he is not familiar with court procedure, the duty must necessarily be circumscribed by what is reasonable. Clearly it cannot and does not extend to his providing to the accused at each stage of his trial the kind of advice that counsel could be expected to provide if the accused were represented by counsel. If it did, the trial judge would quickly find himself in the impossible position of being both advocate and impartial arbiter at one and the same time. (These words were expressly approved by the Ontario Court of Appeal in **R. v. Turlon** (1989), 49 C.C.C. (3d) 186 at 191.)

[154] In considering the ability of the appellant to conduct his own defence in three separate conspiracy trials, Cacchione, J. had determined in the **Rowbotham** application that on the first branch of the test, the appellant had satisfied him that the case was of such a complex nature that it would be difficult for him to adequately represent himself. However, by the time this case came to trial the appellant had the benefit of experience gained in defending himself in matter No. 142212, in which his co-accused was represented by experienced counsel.

[155] Although this was a conspiracy trial, with some issues beyond the experience, skill or training of the appellant, there are a number of factors which should be taken into account.

[156] The appellant, as one of two indicted co-conspirators, had just gone through a two-month conspiracy trial involving alleged traffic in narcotics before a jury. The trial was relatively complicated and involved several *voir dires* as well as more issues than those arising in the subject trial. The other accused was represented by competent counsel. That experience enabled the appellant to be aware of his right to cross-examine witnesses for the prosecution, of his right at the close of the prosecution to remain silent or to give evidence, that he was liable to be cross-examined if he gave evidence, of the right to call witnesses in his own defence, of the right to make submissions on any issue raised in the course of the trial, and of the right at the end of the trial to make submissions to the jury. (See guide list prepared by the Hon. Justice

Salhany (*Carswell*), 1992 (pp. 3-4) approved by this court in **R. v. Kennie** (1993), 121 N.S.R. (2d) 191, per Roscoe, J.A. at 197).

[157] The defence advanced by the co-conspirator was helpful to the defence of the appellant. A **Charter** motion was advanced on behalf of the appellant during the course of the first trial by Mr. Arnold. Cacchione, J. noted that "Mr. Innocente was in regular contact with Mr. Zimmer and obtaining advice from him".

[158] The evidence in the subject trial commenced on the afternoon of Tuesday, April 6, 1999, and, including five witnesses called by the appellant, concluded at noon on Monday, April 19. In fact, evidence was only called on six days, four days being partial days only. The Crown called twenty witnesses, the examination of only one, Mr. Henneberry, was of any length, and his examination-in-chief was less than one day; The trial was neither lengthy nor unduly complex.

[159] There was a series of accommodations made by Cacchione, J. to assist the appellant in the conduct of his defence. Arrangements were made for a transcript of Henneberry's evidence-in-chief to be delivered to the appellant on the same day the evidence was given. The appellant was then given a full day to prepare for his cross-examination. At the resumption of court, the Crown made a successful motion to amend the indictment to conform with the evidence by back-dating the first count from June 1, 1995, to May 15, 1995. Cacchione, J. then adjourned the appellant's cross-examination of Henneberry for a further twenty-four hours. Thus, the appellant effectively had in

excess of two full days to prepare for the cross-examination of Henneberry, with the benefit of the transcript of the examination-in-chief.

[160] At the direction of the trial judge, the Crown provided to the appellant a list of witnesses to be called each day, the order in which the Crown proposed calling the witnesses, and an up-date on a daily basis. The trial judge cautioned the appellant about using tape recordings of Henneberry's testimony to impeach his credit in case there were prejudicial matters on the tapes damaging to the appellant. When witnesses for the defence, who had not been subpoenaed, did not show up for court at the scheduled time, the case was adjourned to another day to permit the appellant more time to prepare. The consideration extended by the trial judge to the appellant throughout the trial resulted in the appellant seeking guidance on a number of issues through continuing dialogue with the court. The trial judge also raised the issue of prior consistent statements in the context of playing a re-enactment of Henneberry's trips to Montreal which resulted in a ruling to eliminate the audio portion of the video.

[161] Throughout, a reading of the transcript of this trial reveals that the trial judge was sensitive to the interests of the appellant as an unrepresented litigant at every turn in the trial.

[162] Counsel for the appellant takes the point that the court did not advise him of his right to challenge jurors for cause since these jurors were to be selected from the same panel from which the jury at the first trial was selected. It was submitted that it was reasonable to infer that they would have knowledge about the outcome of the first trial

and would have an interest in following a trial which took place for which they had not been selected.

[163] The ability to challenge for cause requires that the challenger show realistic potential for partiality. In **R. v. Sherratt** (1991), 63 C.C.C. (3rd) 193 (S.C.C.) at 212, the court said that a distinction must be made

> . . . between mere publications of the facts of a case and situations where the media misrepresents the evidence, dredges up and widely publicizes discreditable incidents from an accused's past or engages in speculation as to the accused's guilt or innocence.

[164] The appellant has not pointed to anything to suggest that there was a realistic potential for partiality on the part of any member of the jury panel. Cacchione, J. instructed the jurors to banish from their minds all present information and bias they might have about the case, either because of its nature or anything that they may have read. They were to consider only the evidence presented in the court room. The same caution was again given to the jurors before they began their deliberations.

[165] The appellant has not shown that a specific instruction from the court to him respecting challenge of jurors for cause was needed.

[166] This was not a case where the trial judge was called upon to assist the appellant in the cross-examination of the Crown witnesses in order to protect the interests of the appellant, nor was it a case where the appellant failed to articulate clearly his defence.

[167] In his submission to the jury, the appellant vigorously attacked the credibility of Henneberry, stressing his lengthy criminal record, including his convictions for dishonesty, his drug habits, the inconsistency in the statements he gave to the police, highlighted by his own admission that he was a "liar, a cheat and a thief".

[168] My review of the cross-examination conducted by the appellant, the submissions made at various points during the evidence, as well as his summation to the jury, leads me to conclude that the appellant had acquired skill in the art of conducting a defence. In short, I am satisfied that he put up a good defence in the face of a very strong case against him.

[169] I dismiss the submission of the appellant's counsel that Cacchione, J. did not adequately place the theory of the defence before the jury. He clearly put to them the defence's submission that Henneberry was a dishonest, untrustworthy and unreliable witness upon whose testimony it would not be safe to convict.

[170] The transcript of the appellant’s trial reveals that the trial judge met the requirements described in Salhany’s Criminal Trial Handbook, Carswell, 1992 as referred to by Griffiths, J.A. in **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.) and cited with approval by Roscoe, J.A. in **R. v. Kennie** (1993), 121 N.S.R. (2d) 91 (N.S.C.A.). The appellant was:

(a) able to cross-examine the witnesses for the prosecution and did so effectively;

(b) advised of the right to remain silent or give evidence on his own behalf;

(c) permitted to and did call witnesses in his own defence;

(d) permitted to and did address the court on the issues raised in the course of the trial;

(e) able to make submissions to the jury at the end of the trial.

[171] I would reject this ground of appeal.

Issue 6: Failure to Properly Instruct the Jury

[172] The global assertion that the trial judge failed to properly address the jury finds no support in the record. I have reviewed the detailed charge which was given by a trial judge very experienced in matters of this sort. It was detailed, fair and balanced and free of error.

[173] I would dismiss this ground of appeal.

Issue 7: Two-Count Indictment

[174] In his supplementary submissions, counsel for the appellant takes the position that the Crown proved a single agreement of conspiracy that was ongoing from the time it was made on the trip from the Annapolis Valley until the altercation on July 2, 1995. There should, he submits, be but one conviction.

[175] In her summation to the jury, Crown counsel said:

> . . .There are two charges on this indictment, but there's only one agreement. There aren't two agreements here, I would suggest . . . It's only fair and appropriate to convict him on one of those two conspiracy charges. There weren't two conspiracies, I would suggest. There's only one. . . .

[176] In **R. v. Cotroni** (1979), 45 C.C.C. (2d) 1 at p. 25, and in **R. v. Douglas** (1991), 63 C.C.C. (3rd) 29 at p. 45-46, the Supreme Court of Canada has indicated that it is appropriate to look at the Crown's opening address at trial to identify the nature of the conspiracy alleged against an accused. Notwithstanding that there were two counts in the indictment here, I am satisfied that one conspiracy was alleged and proved.

[177] The principle that there cannot be multiple convictions for the same delict was clearly affirmed in **Keinapple v. R.** (1974), 15 C.C.C. (2nd) 524 (S.C.C.). It was held in **Cox and Paton v. R.** (1963), 28 C.C.C. 148 that where there is but one agreement and not separate agreements to effect different unlawful objects there can only be one conviction. Here there was one agreement to effect one unlawful object - trafficking in a narcotic, cannabis resin. Although the circumstances in **Cox and Paton** are different, the general principle is clear. If there is only one conspiracy, there should be only one conviction.

[178] There were two counts in the indictment, one relating to the period May 15, 1995, to July 30, 1995, and the other to the period June 1, 1995, to August 30, 1995. The jury convicted on both. While the period of unlawful activity pursuant to the agreement spanned the time periods on both counts, the agreement constituting the conspiracy was concluded at the latest on the return trip from the Plantation Camp

Ground in the Annapolis Valley. The evidence clearly establishes this to have taken place in late May or June of 1995 and, in any event, well before July 2.

[179] In these circumstances, I would quash the conviction on the second count of the indictment.

Issue 8: Testimony with Respect to "A Substance"

[180] The Thunderbird was seized on March 26, 1996, by the RCMP. It was taken to Beaton's Towing compound in Lower Sackville, photographed and searched. A warrant had been obtained to install a tracking device in it. Corporal Alfred Baldwin testified that he was called to assist in installing the device. The rear seat of the vehicle was removed. There was a secret compartment behind the seat with a locking mechanism to release the seat, operated from the glove compartment. Corporal Baldwin testified that he discovered what he referred to as "some substance" in the secret compartment. It was decided to stop the installation of the tracking device and take other steps.

[181] Following Cpl. Baldwin's testimony, the appellant raised with the trial judge the question of the prejudice that would result from his evidence respecting the substance. There had been newspaper publicity indicating that drugs were found in the Thunderbird. Counsel for the Crown replied that she relied only on the existence of the compartment to corroborate Henneberry's testimony. The trial judge then pointed out to the appellant that to caution the jury would only make what is not an issue an issue in their minds. He said that he could and was prepared to indicate to them that they were not to draw any inference from this evidence, but that it would highlight the point. He

said he would deal with it in his closing arguments but felt that to highlight it at that stage would be more prejudicial than beneficial. In the event, the trial judge did not touch upon this point in his closing remarks, nor did the appellant or counsel for the Crown raise the issue again.

[182] Counsel for the appellant takes the position that the evidence with respect to the substance found in the Thunderbird was irrelevant and highly prejudicial. He refers to the newspaper publicity at the time. He submits that there is no evidence of any conspiracy between the appellant and Henneberry after July 2, 1995. The evidence of a substance found some nine months later was highly prejudicial. So much so that, particularly in the absence of a caution from the trial judge, a new trial should be granted.

[183] In my opinion, evidence of what was found in the Thunderbird in March of 1996 was not relevant to prove the conspiracy alleged to have been formed the previous year in the absence of some evidence connecting it in some way to that agreement. There was no such evidence. I therefore reject the Crown's submission before us that the evidence was admissible in proof of the conspiracy. The question therefore is whether the testimony regarding the substance was so prejudicial that failure on the part of the trial judge to declare a mistrial or at least caution the jury amounted to an error requiring appellate review. The resolution of this question requires consideration of this evidence in the context of the entire case against the appellant.

[184] The only evidence directly implicating the appellant came from Henneberry. Even the Crown conceded that such testimony standing by itself would probably not warrant a conviction. It relied heavily upon the evidence which corroborated Henneberry's testimony.

[185] A major element of the Crown's case was the Thunderbird car which Henneberry said was used to transport the drugs in the secret compartment behind the rear seat. He said that this car was furnished to him by the appellant.

[186] Helene Guitard testified to the fact that the appellant purchased the Thunderbird and put it in her name. Thereafter, she exercised no acts of ownership and the appellant discontinued his relationship with her. The appellant himself was never seen driving the vehicle. It was, however, seen near his driveway, and in his girlfriend's driveway. His girlfriend testified that she saw him giving the keys of it to other persons who were seen giving him money. He was present when the drugs were unloaded from, and money was loaded into, the Thunderbird.

[187] The appellant's conduct with respect to the Thunderbird was highly suspicious. The Crown introduced wiretaps of two conversations the appellant had with his girlfriend, Lisa Harrison. In the first, the parties engaged in a very intimate discussion which terminated abruptly when Harrison suddenly asked where the keys for the Thunderbird were. The appellant said "I gotta go". When asked why, he said "because".

When asked "because why?" he said "I'll talk to you tomorrow". He hung up on Harrison, notwithstanding her request not to do so.

[188] The following day the appellant spoke to Harrison on the telephone again. He said, "You got pretty stupid on the phone. . . If I wanted everyone to know about what I'm uh driving, I'd just go out an' put a sign up." When Harrison said she did not know what he was talking about, the appellant responded "Well you'd better think about it when you talk". The conversation ended abruptly thereafter.

[189] Henneberry's description of the apartment No. 301 Clark Street in Montreal was supported by a video of the apartment occupied by Francois Jarmain, taken by the RCMP some time later. In December of 1998 Henneberry directed a police officer to the apartment. Henneberry's testimony found further support in the fact that Helene Guitard identified him as a person she had seen in the presence of the appellant in Montreal. In October 1995 the police had seen the Thunderbird parked in front of the building housing apartment No. 301 on Clark Street.

[190] Evidence from the police confirmed the existence of the appellant's trailer as described by Henneberry at the Plantation Camp Ground.

[191] Henneberry testified to the fact that Francois Jarmain drove a Nissan vehicle. The fact that he was seen driving such a vehicle was confirmed by police surveillance in

Montreal. Jarmain was identified from photographs by Henneberry and the police separately. Francois Jarmain was arrested by the police on May 15, 1996.

[192] In short, there was overwhelming corroborative evidence connecting the appellant to the Thunderbird with a secret compartment, used to transport drugs and money, a vehicle which he owned, but from which he did everything possible to distance himself.

[193] We do not know whether at the time of giving his closing instructions Cacchione, J. had forgotten this point or whether he deliberately decided that to raise it after all that had intervened in this trial would only remind the jurors of it to the prejudice of the appellant. While the latter is more probable, I am prepared to assume for the appellant's benefit that it was omitted by oversight.

[194] In giving his reasons for sentencing, Cacchione, J. reflected upon the strength of the Crown's case at trial. He said:

> . . . Had the Crown's case consisted solely of the testimony of Mr. Henneberry, I doubt very much that there would have been a conviction and the Crown acknowledged that in its closing address to the jury, and asked the jury to look at other circumstances that would tend to establish guilt beyond reasonable doubt. . . . Having heard the trial, as I said before, had the Crown's case been Henneberry alone, no doubt the result would have been different than it was. I have no hesitation in believing that the jury arrived at the verdict after considering all of the evidence and in particular that which confirmed the testimony of Mr. Henneberry.

[195] I agree, and find particular significance in these observations from an experienced trial judge, present throughout the trial, and having the opportunity of

seeing and hearing these witnesses. In the context of the very strong corroborative evidence and in particular that relating to the compartment, I am of the opinion that the brief reference by Cpl. Baldwin to a substance found therein was not prejudicial to the appellant at his trial. The appellant did not testify, and in the face of the strong case against him, I am satisfied that a conviction was inevitable.

[196] Alternatively, if it could be said that the trial judge erred in the manner in which he dealt with this evidence, I am satisfied that this is a case for the application of s. 686(1)(b)(iii) of the **Code**. No substantial wrong or miscarriage of justice has occurred because had the alleged error not occurred, I am satisfied that there is no possibility that the result would have been different.

Disposition

[197] I would allow the appeal to the extent of quashing the conviction on the second count of the indictment and dismiss the appeal from the conviction on the first count.

Chipman, J.A.

Concurred in:

Freeman, J.A.